



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

MISC.CIVIL APPLICATION NO. 12 OF 2018

IN THE MATTER OF AN APPLICATION BY ANNE WANJIKU GATHUMBI FOR ORDERS OF MANDAMUS

AND

IN THE MATTER OF ARTICLE 40, 47, 60 AND 165(3,5,7) OF THE CONSTITUTION & SECTION 13(1&7) OF THE ENVIRONMENT AND LAND COURT ACT & THE FAIR ADMINISTRATIVE ACTIONS ACT

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF SECTIONS 14,24,25 OF THE LAND REGISTRATION ACT NO. 3 OF 2012

IN THE MATTER OF THIKA MUNICIPALITY BLOCK 7/186 AND THIKA MUNICIPALITY BLOCK 7/187

REPUBLIC OF KENYA.....APPLICANT

VERSUS

LAND REGISTRAR, THIKA REGISTRY.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

CHARLES KIMANI KURIA.....INTERESTED PARTY

EX PARTE ANNE WANJIKU GATHUMBI

RULING

The matter for determination is the Notice of Motion Application dated 23rd July 2018, by the Interested party seeking for orders that;

- 1. THAT the Honourable Court be pleased to order that the Applicant be enjoined to this case and be heard before hearing an determining the exparte Applicants application dated 23rd May 2018 or any other Application the applicant may make affecting the suit property.***
- 2. THAT the Honourable Court be leased to strike out or dismiss the exparte Applicant's application dated 24th May 2018.***
- 3. That the cost of this Application be provided for.***

The Application is premised on the grounds that the interested party is the registered owner of the suit parcels of land and therefore he ought to be heard. Further that the exparte Applicant has prosecuted **ELC No. 731 of 2017**, in secret with knowledge that there are other cases involving other parties over the same subject matter. That the matters relating to ownership of the said land are subject of **Thika ELC 784 of 2017**, in which the Ex parte Applicant is a Defendant among others and the move to compel the **District Land Registrar** to cancel the interested party's title when issues relating to the ownership of the land are before the Court awaiting determination is an attempt to steal a match against the interested party. Further that matters relating to the suit land are subject of **Thika ELC Petition no. 789 of 2017**, in which the Court has restrained the **Chief Land Registrar** and the Director of Survey from cancelling the interested party's title to the suit land and

any orders issued in favour of the Ex parte Applicant herein are likely to conflict with the orders issued in the said **Thika ELC Petition No. 789 of 2017**.

In his **Supporting Affidavit** he averred that he is the registered proprietor of the suit parcels of land, the Plaintiff in **Thika ELC 784 OF 2017** and the petitioner in **Thika ELC petition 789 of 2017** and it would therefore be proper that he is joined to the suit as he only became aware of the suit when an officer from the District Land Registry called him to inform him that the Applicant has applied to cancel his title.

The Application is opposed and the Ex parte Applicant filed a Replying Affidavit sworn on **2nd November 2018**, and averred that on the **27th July 2010**, she bought two parcels of land that at were at the time unsurveyed and known as **Plot A allotment 183889/44** and **Plot B allotment Number 183889/45** from one **Joseph Mwangi Mwai** to which she paid the full purchase price of **Kshs. 500,000/=** and a further **Ksh. 337,010/=** as the Standard Premium for the property as the owner had not paid the amount. She averred that after receiving the entire payment, the owner refused to execute the transfer documents in her favor despite signing an undertaking to the effect that he will avail himself for the purpose.

She contended that she was forced to file a suit in the High Court at Nairobi being **Civil Suit 63 of 2011**, for orders to compel **Joseph Mwangi** to execute the documents of transfer of the plots as well as sign an irrevocable Power of Attorney in her favour and in the Month of **March 2012**, the High Court issued an Injunction restraining the said **Joseph Mwai** from transferring or selling the suit land to any third party. She further averred that though the said **Joseph Mwangi Mwai** was represented by Counsel, the Counsel ceased acting for him and the suit has proceeded in his absence despite being served with hearing Notices. That the case was later transferred to Thika Environment & Land Court and allocated **ELC No.73 of 2017** on the **6th February 2017**. Hearing of the case came up on the **17th of October 2017** wherein the Applicant and one more witness testified but the Defendant was absent.

She however learnt on the **14th of December 2017**, that there were some individuals who were surveying the suit land and had done so on several occasions and upon further inquiry, she learnt that the Interested Party alleged to be the owner of the land having acquired it in December 2015 and asserted that the said **Joseph Mwangi Mwai** sold the two parcels of land to him in the year 2014 after completion of the process of survey and issuance of the title deed in his name. She contended that the two parcels of land were registered as **Thika Municipality Block 7/186 and 7/187** and the process took place despite the existence of the injunctive orders issued in the year 2012 against the said **Joseph Mwangi Mwai**. She further averred that on the **9th of April 2018**, this Court delivered its Judgment and vested the title of the suit lands to her and the fact that the process of adjudication and titling has already been completed and titles issued to the Applicants, she cannot proceed to execute the Judgment with an intention of processing the titles to the suit land.

She further averred that on the **17th of May 2018**, she applied for leave to be granted to enable her apply for orders of mandamus against the 1st Respondent and the same was granted and that due to the irregular and fraudulent manner in which the process of titling occurred, she stands the risk of losing her property .

She contended that the Interested Party's suit is seeking for various issues for determination being cancellation of the title, determination of ownership, boundaries between the properties, and damages for wrongful entry. Further that the **Constitutional Petition of 789 of 2017** is dealing with issues of deletion of the title numbers for the suit land known as **Thika Municipality Block 7/186 and 7/187**, registered in his name and the issue of ownership is not one of the issues for determination. She averred that other cases do not entirely touch on the issue of ownership which she averred was of importance and urged the Court to disallow the Application.

The Application was canvassed by way of written submissions which this Court has now carefully read, considered and renders itself as follows;

The Issue for determination is whether the Applicant is entitled to the orders sought.

It is important to note that the Application sought for an order to allow the Interested Party to be enjoined in the suit. However on the **22nd of October 2018 Ms . Ndundu** Counsel for the 1st and 2nd Respondent stated that she did not oppose the Application and the **Mr. Nduhiu** for the Ex parte Applicant also stated that they were not opposed to the Application to have the Interested Party enjoined in the suit. Consequently, he was allowed to be enjoined as the same was not opposed.

What remained for determination is whether or not the Ex parte Applicants suit should be dismissed. The power to strike out suits or pleadings is espoused in Order 2 rule 15 of the Civil Procedure Rules. It is a discretionary power. That discretion, nonetheless, must be exercised very judiciously and not capriciously. In the case of **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] eKLR the Court held that:**

A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.

What then this Court must determine is whether the instant suit is so hopeless that it cannot be cured. The interested party's/ Applicants contention is that there are various other suit that deal with the same issue and the Ex parte applicant is attempting to steal a match against him by filing the instant suit. On the other hand the Exparte Applicant states that the issues raised between her and the Respondents are not the same issues that had been raised in the other matters that had been filed as a competent Court had already declared her the owner of the suit property and therefore she is entitled to the orders of Judicial Review

This Court notes that while the issue of ownership with regards to the applicant and one **Joseph Mwai Mwangi** has already been determined the issue of ownership between the Applicant and the interested party is yet to be determined and the same is still subject of other cases before this Court which must first be determine. This Court is well aware that if it grants the Judicial Review Orders, it will effectively be determining the issue of ownership which is in contention between the parties and therefore will have denied the Interested Party a chance to be heard. This is so because a Judicial Review proceeding is not concerned with the merits of the case but the process to which a decision was arrived at. In this regard therefore the merits of ownership can only be determined in a Civil Case.

On the other hand seeking to strike out the suit herein will also be drastic as the Ex parte Applicant is seeking to enforce orders that she got as a result of her being a successful litigant and therefore seeking to enjoy the fruits of her Judgment. While this matter cannot be termed as sub judice it bears some resemblance to sub judice which is provided under Section 6 of the Civil Procedure Act which provides;

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

This Court is well aware that the parties to this suit are not the same and the issues being raised are not the same as the ones raised by the other matters. However, this Court notes that the issue of ownership between the Ex arte Applicants/Respondents and the Interested Party/ Applicant is still in contention. While the foot note in section 6 requires that the Court stays one suit in case they bear similarities, the practice is always that the suits are consolidated. However in this instant case the Court notes that only one issue bear resemblance and the issue sought by the Ex parte Applicant cannot be dealt with in the ordinary suit and therefore it is this Court’s holding that the only way Justice can be delivered is by staying the instant suit to allow the Court to determines the issue of ownership between the Ex parte Applicant and the Interested party.

While this Court is well aware that the Ex parte Applicant is entitled to enjoy the fruits of her Judgment, the only dilemma is;- what if the Court grants the order of mandamus and allows the Ex parte Applicant to be registered as the owner of the suit property and then in the other suit it holds that the Interested party is the legal owner of the suit property? that would mean another process of litigation wherein the Applicant again comes to Court seeking cancellation of that Registration. Further there is an injunction on the suit land that prohibited cancellation of the Applicants title to the suit land, Orders which have not been vacated and therefore there would be difficulties presented in implementation of any Orders given in this instant suit. That would also mean counter litigations thereby prolonging the Court process.

Therefore the court finds the proper way and the one that would save the Court’s time is to allow the Applicant ventilate his issues and once the issue of ownership between the parties has been sorted out then the Court would be in a position to deal with the Ex parte Applicants’ Judicial Review application.

Having now carefully read and considered the pleadings by the parties, the affidavits and the written submissions, the Court finds that the only way that interest of Justice would be served is to have the instant suit **stayed** pending the hearing and determination of **ELC No.784 of 2017** and **Petition No.789 of 2017**. Consequently, the court finds that the prayer to have the instant suit dismissed is not merited and the said application is dismissed entirely with costs being in the cause.

However, the court directs that the instant suit be and is hereby Stayed as provided by Section 6 of the Civil Procedure Act pending the hearing and determination of **ELC No.784 of 2017** and **Petition No.789 of 2017**.

It is so ordered.

Dated, Signed and Delivered at Thika this 15th day of November 2019.

L. GACHERU

JUDGE

15/11/2019

In the presence of

Mr. Nduhiu for Ex Applicant

No appearance for 1st Respondent

No appearance for 2nd Respondent

No appearance for Interested Party/Applicant

Jackline - Court Assistant.

L. GACHERU

JUDGE

15/11/2019